89-317

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD J. WALL,
Petitioner,

vs.

UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; OTIS BOWEN; MERIT SYSTEMS PROTECTION BOARD; and HERBERT ELLINGWOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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58 pp

QUESTION PRESENTED

Richard J. Wall, a 64 year-old employee of the Department of Health and Human Resources, was informed on September 18, 1984 that he would be "removed" from his civil service position because a physical disability (an amputation below his left knee in 1981) prevented him from performing his employment duties. Wall was advised at the time that, if he believed this action was based on discrimination, he could either appeal the decision to the Merit Systems Protection Board or file a discrimination complaint within the Department. Wall then sought advice from within the Department concerning his retirement rights and, based upon such advice, Wall executed an application for retirement. Wall then filed a timely appeal to the Merit Systems Protection Board protesting his termination based upon handicap and age discrimination. The Board held that since Wall had "voluntarily" retired it had no jurisdiction of his discrimination claims. Wall then sought de novo judicial review of his discrimination claims in U.S. District Court for the District of Kansas, which dismissed his claim on the basis of lack of subject matter jurisdiction. The question presented is:

Whether federal civil service employees should be afforded the same rights of de novo judicial review of discrimination claims as those of employees in the private sector.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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No.

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RICHARD J. WALL,
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UNITED STATES OF AMERICA; DEPARTMENT OF HEALTH AND HUMAN SERVICES; OTIS BOWEN; MERIT SYSTEMS PROTECTION BOARD; and HERBERT ELLINGWOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Richard J. Wall respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals (App., *infra*, A1-A19) is reported at 811 F.2d 1540 (10th Cir. 1989). The opinion of the United States District Court for the District of Kansas (App., *infra*, A20-A28) is reported at 637 F.Supp. 90 (D. Kan. 1986). The initial opinion of the Merit Systems Protection Board (App., *infra*, A29-A35) is not reported. The opinion on Wall's petition for review of the initial decision (App., *infra*, A36-A37) is summarily reported at 27 M.S.P.R. 647 (1984).

JURISDICTION

The United States District Court for the District of Kansas entered its judgment on June 3, 1986. After a timely appeal, the Tenth Circuit Court of Appeals affirmed the district court on March 31, 1989. Thereafter, on May 24, 1989, the Tenth Circuit Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc. The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved and the pertinent portions included in the Appendix:

5 U.S.C. §7702 (1982)

5 U.S.C. §7703 (1982)

5 U.S.C. §7512 (1982)

29 U.S.C. §794a (1982)

42 U.S.C. §2000e-16 (1982)

STATEMENT

A. Material Facts.

Richard J. Wall was employed by the Department of Health and Human Services ("Department") in October, 1973. His left leg was amputated below the left knee in 1981 due to a diabetic condition. App., *infra*, A1. On August 17, 1984, the director of Wall's division of the Department gave Wall a notice of proposed termination. App., *infra*, A8. Wall protested this decision to his regional director, but on September 18, 1984, Wall was informed in a written memorandum that the termination decision would become effective on September 28 because the physical disability prevented him from performing his employment duties and that there was no possibility of a lateral transfer. App., *infra*, A1, A8. This memorandum informed Wall that he could appeal the decision to the Merit Systems Protection Board ("Board"). The memorandum further informed Wall that an appeal to the Board containing an allegation of discrimination would not be processed concurrently with a discrimination claim filed within the Department and that, therefore, Wall could *either* appeal to the Board, raising the matters of discrimination in such appeal, *or* file a discrimination complaint with the Department after first consulting with an Equal Employment Opportunity Counselor. App., *infra*, A8-A9.

Wall then, at the suggestion of the Department, sought advice concerning his retirement rights. Wall claims he was misled and misinformed by employees of the Department concerning those rights, which led to his application for retirement shortly prior to September 28, 1984, with an effective date of September 28,

1984. App., *infra*, A1. Wall then timely appealed the decision of the Department to the Board raising his claims of age and handicap discrimination, and claiming that his retirement was involuntary. App., *infra*, A29.

B. Proceedings in the Lower Courts.

The Board's Presiding Official first held that the "threshold issue" was whether there had been a personnel action effected against Wall which was appealable to the Board and that a "voluntary" retirement was not subject to the Board's appellate review. App., *infra*, A29. The Presiding Official then determined that Wall's retirement was voluntary and that, therefore, Wall was not affected by an "adverse action" appealable to the Board under 5 U.S.C. Chapter 75. Wall's appeal was then dismissed with prejudice for lack of appellate jurisdiction. App., *infra*, A34. A petition for review of the initial decision was filed with the Board, which was denied. App., *infra*, A35.

Wall then timely sought de novo judicial review in United States District Court for the District of Kansas under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§701 et seq., and the Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq. Wall alleged as a jurisdictional basis 28 U.S.C. §1331; 28 U.S.C. §1343; 29 U.S.C. §§621 et seq.; and 29 U.S.C. §§701 et seq. App., *infra*, A20. (Wall also concurrently filed an appeal to the United States Court of Appeals for the Federal Circuit. App., *infra*, A4. This proceeding has been stayed pending final resolution of the instant action. App., *infra*, A19.)

The district court dismissed Wall's claim, upon motion filed by the defendants, for lack of subject matter

jurisdiction. App., *infra*, A27. The district court reasoned that since the Board had made a factual finding that Wall's retirement was "voluntary", that his case was not a "mixed" case falling within the provisions of 5 U.S.C. §7702 and that the Court of Appeals for the Federal Circuit had exclusive jurisdiction over Wall's case. App., *infra*, A24.

The Tenth Circuit Court of Appeals affirmed the district court in a 2-1 decision. The majority held that the Federal Circuit Court of Appeals had exclusive jurisdition to hear Wall's appeal from the Board's order that Wall had voluntarily retired. App., *infra*, A7. The majority pointed out that if the Federal Circuit should reverse the Board, then presumably Wall would be entitled to present his discrimination claims to the Board, and subsequently be entitled to de novo judicial review in district court. The majority also pointed out that if the Federal Circuit should uphold the Board's decision, Wall would not be entitled to any de novo review of his discrimination claims because if Wall in fact voluntarily retired, he could not argue that his termination was due to agency discrimination. App., *infra*, A5-A6. However, as the dissenting opinion pointed out, if the two issues of voluntary/involuntary retirement and whether discrimination resulted in constructive discharge, i.e. involuntary retirement, are one in the same, then requiring Wall to pursue his appeal in the Federal Circuit deprives him of de novo judicial review of his discrimination claims. App., *infra*, A15.

REASON FOR GRANTING THE PETITION

An Important Question of Federal Law Has Been Decided by the Tenth Circuit Court of Appeals Which Has Not, But Should Be, Decided by This Court.

The ultimate question decided by the Tenth Circuit Court of Appeals was whether Federal employees have the same rights and remedies as those employees in the private sector and in State and local governments. There is no doubt whatsoever that if Wall had been an employee in the private sector under the same factual circumstances, that a determination of whether he had involuntarily or voluntarily retired made by the Equal Employment Opportunity Commission would have been judicially reviewed de novo in conjunction with his discrimination claims. In fact, such issue is inseparable from his discrimination claims. App., *infra,* A15.

Justice Seymour's strong and well-reasoned dissent as set forth in the Tenth Circuit's decision in this case is unassailable and sets forth two strong and unarguable positions: (1) that a Federal employee is entitled to de novo judicial review of a discrimination claim; and (2) the statutes in question can be interpreted so as to allow such de novo review under the factual circumstances set forth above.

One of the thrusts behind the Civil Service Reform Act provisions, the civil rights statutes and associated administrative enforcement procedures is

> "to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local governments; . . . ."

Message of the President accompanying Reorg. Plan No. 1 of 1978, 3 C.F.R. 32 (1978), *reprinted in* 5 U.S.C. App. at 1155 (1982), *and in* 92 Stat. 3781 (1978).

The decision of the Tenth Circuit in the instant case deprives a Federal employee of his right to de novo judicial review of his discrimination claims—a right afforded to all employees in the private sector.

Further, Wall was given two choices by the Department in which to have his discrimination claim reviewed: either by the Board, or by filing a discrimination complaint within the Department. If Wall had chosen the second option, he would have been entitled to de novo judicial review. App., *infra*, A12. However, with respect to appeals to the Board, 5 U.S.C. §7702(a)(1) provides that an employee who has been affected by an action which the employee *may appeal* to the Board *and* alleges a basis of discrimination, shall be decided by the Board within 120 days. Appealable, "adverse" actions are found at 5 U.S.C. §7512 and are very limited in their circumstances. There are a number of "actions" which can take place in the workplace as a result of prohibited discriminatory acts which do not fit into the categories set out at 5 U.S.C. §7512. For instance, the failure of an employee to respond to sexual overtures of a supervisor could result in an employee being suspended for 10 days, by the supervisor as a retaliatory action, and said employee would have no "appealable action" to the Board under the Tenth Circuit's opinion in the case at bar. Such could not be the intent of Congress.

5 U.S.C. §7703 provides that all decisions of the Board are subject to judicial review by the Federal Circuit Court of Appeals, except "cases of discrimination," which are to

be filed pursuant to the relevant discrimination acts, all which entitle employees to de novo judicial review. For instance, the Rehabilitation Act, 29 U.S.C. §794a, states that the remedies, procedures, and rights set forth in 42 U.S.C. §2000e-16 shall be available to any Federal employee. That statute provides that an employee may file an action in district court within 30 days of final agency action. Wall asserts that the Board took final agency action on his *discrimination* claim and is therefore entitled to de novo judicial review. Thus, 5 U.S.C. §7703 can be interpreted to allow for de novo judicial review.

As stated above, if Wall had chosen the second option given to him by the Department he would have been entitled to de novo judicial review. App., *infra,* A12. Such contrary results as has resulted from the Tenth Circuit's decision should not be reached when an employee chooses one administrative remedy over another under the same Federal Act, i.e. the Civil Service Reform Act. Therefore, interpretation of the Act is required so as to be in conformity with the intention of Congress to provide "a unified, coherent Federal structure to combat job discrimination in all its forms." Message of the President accompanying Reorg. Plan No. 1 of 1978, 3 C.F.R. 32 (1978), *reprinted in* 5 U.S.C. App. at 1155 (1982), *and in* 92 Stat. 3781 (1978).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Filed March 31, 1989)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

86-2004

RICHARD J. WALL,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OTIS BOWEN; MERIT SYSTEMS PROTECTION BOARD; and HERBERT ELLINGWOOD,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Kansas
(D.C. No. 85-2307)

J. Larry Louk (Michael L. Snider and Timothy J. Arehart of Thomas, McDonald, Maier, Dykes & Johnston, Chartered, with him on the brief), Overland Park, Kansas, for Plaintiff-Appellant.

E. Yvonne M. Ernzen (Benjamin L. Burgess, Jr., United States Attorney, District of Kansas; Julie Robinson Trice, Assistant U.S. Attorney, Kansas City, Kansas; Of Counsel: Paul P. Cacioppo, Chief Counsel, Region VII, Department of Health and Human Services; and Frances Reddis, Assistant Regional Counsel), Kansas City, Missouri, for Defendants-Appellees.

Before SEYMOUR and McWILLIAMS, Circuit Judges, and BOHANON, Senior District Judge.*

McWILLIAMS, Circuit Judge.

Richard J. Wall, a resident of Kansas, was employed by the Department of Health and Human Services (Department) from October, 1973, to September 28, 1984, when his employment was terminated. Shortly prior to September 28, 1984, Wall executed an application for retirement with an effective date of September 28, 1984.

Notwithstanding his application to retire, Wall thereafter filed a timely appeal to the Merit Systems Protection Board (Board) protesting his termination. Wall's position was that on September 18, 1984, the Department informed him that he would be "removed" from his civil service position on September 28, 1984, because a physical disability prevented him from performing his employment duties and, further, that there was no existing possibility of lateral transfer. According to Wall, at the suggestion of the Department, he then sought advice concerning his retirement rights and that he was misinformed and misled by employees of the Department concerning those rights, all of which led to his application for retirement. Wall claimed that his employment was terminated by the Department because of his age, 65 years of age, and his physical handicap, his left leg having been amputated below the knee in 1981, apparently the result of a diabetic condition.

A hearing was held before a Presiding Official of the Board, which hearing was limited, in the first instance,

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*Honorable Luthern L. Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

to the single issue of whether Wall "voluntarily" retired on September 28, 1984. Evidence was taken by the Presiding Official on the issue of the voluntariness of Wall's application for retirement, and the Presiding Official held that Wall's retirement was voluntary. Because a voluntary retirement is not an adverse action which is appealable,[1] the Presiding Officer dismissed Wall's appeal on the ground that the Board had no jurisdiction to hear Wall's claim of wrongful employment termination because of his age or physical handicap.[2] Wall filed a timely petition for review by the Board of the Presiding Official's ruling. On May 2, 1985, the Board denied Wall's petition for review.

On May 29, 1985, Wall filed an action in the United States District Court for the District of Kansas, naming as defendants the United States of America; the Department and Margaret Heckler, then Secretary of the Department; and the Board and its head, Herbert Ellingwood. In his complaint, Wall stated that, after being advised that the Department was going to remove him from his civil service position, he sought advice from the Department concerning possible retirement; in the course of that inquiry he was misled and misinformed by the Department; and as a result he applied for retirement. Wall then set forth two claims for relief, the first based on age discrimination, 29 U.S.C. § 621, *et seq.*, and a second based on handicap discrimination, 29 U.S.C. § 701, *et seq.*

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1. Christie v. United States, 518 F.2d 584, 207 Ct. Cl. 333 (1975); Schultz v. United States Navy, 810 F.2d 1133 (Fed. Cir. 1987); 5 C.F.R. § 752.401(c)(3) (1984).

2. Presumably, if the Presiding Officer had ruled that Wall's application for termination was involuntary, he would have then proceeded to hear and rule on the merits of Wall's claim that he was terminated because of his age and physical handicap.

On May 30, 1985, Wall filed a parallel petition for review of the May 2 decision of the Board with the United States Court of Appeals for the Federal Circuit. By agreement of the parties, Wall's proceeding in the Federal Circuit has been stayed pending final resolution of the action filed by Wall in the United States District Court for the District of Kansas.

In the Kansas proceeding the defendants filed a motion to dismiss on the ground that the district court in Kansas lacked subject matter jurisdiction and that because of Wall's voluntary retirement, the Federal Circuit had exclusive jurisdiction to review the ruling of the Board. The district court granted the defendants' motion to dismiss and dismissed Wall's action for lack of subject matter jurisdiction. Wall appeals the district court's order of dismissal. We affirm.

The Memorandum and Order of the district court was published and appears as Wall v. United States, Dep't of Health and Human Services, 637 F. Supp. 90 (D. Kan. 1986). Although the matter is not necessarily free of all doubt, we believe the district court properly construed the statutes in question, and we are in accord with the result reached by the district court and the supporting rationale. We could well let the entire matter rest here, but brief additional comment is in order.

The statutory provisions with which we are primarily concerned are 5 U.S.C. §§ 7703(b)(1), 7703(b)(2), and 7702. Under § 7703(b)(1), "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." The exception in § 7703(b)(2) provides, in effect, that cases of alleged discrimination "subject to the provisions

of section 7702" shall be filed under the applicable statute in a United States District Court. Discrimination cases "subject to the provisions of section 7702" include cases where an employee or an applicant for employment (1) has been affected by an action of an agency which may be appealed to the Board and (2) alleges that the basis for the agency's action was discrimination prohibited, by, *inter alia*, the Rehabilitation Act of 1973 and the Age Discrimination in Employment Act of 1967. *See* 28 U.S.C. § 7702.

The district court in the instant case construed those statutory provisions to mean that where, in a given case, the Board determines that the agency action complained of may be appealed to the Board and where the Board further finds that there was no discrimination, the case falls within the exception mentioned in § 7703(b)(1), and detailed in §§ 7703(b)(2) and 7702. Coming within the exception, the employee, in such circumstance, may then file a discrimination action in a United States District Court, and the Federal Circuit would have no jurisdiction to review such an order of the Board. However, the district court also construed those statutory provisions to mean that where the Board determines, as it did in the instant case, that an employee's appeal to the Board is "not appealable" under the statute, and the Board does not consider the employee's claim of discrimination on its merits, review of the Board's determination that it lacks jurisdiction to hear the employee's claim lies exclusively in the Federal Circuit. As the district court noted, if, in the instant case, the Federal Circuit reverses the Board's determination that Wall's retirement was voluntary, the matter will then be remanded to the Board to hear Wall's discrimination claim on its merits. Should

Wall then suffer an adverse ruling on the discrimination issue, he could then file an action in the district court. It would seem to follow that should the Federal Circuit on appeal uphold the Board's finding that Wall voluntarily retired, such would rule out any claim of discrimination. If Wall, in fact and in law, voluntarily retired, he cannot argue that his termination was the result of agency discrimination.

In support of the district court's construction of these statutory provisions, *see* Synan v. Merit Systems Protection Bd., 765 F.2d 1099 (Fed. Cir. 1985); Ballentine v. Merit Systems Protection Bd., 738 F.2d 1244 (Fed. Cir. 1984); and Williams v. Dep't of Army, 715 F.2d 1485 (Fed. Cir. 1983).

In *Synan* a postal employee appealed a seven-day suspension order to the Board contending that his suspension was the result of agency discrimination because of physical handicap. The Board dismissed the appeal for lack of subject matter jurisdiction and did not reach the discrimination issue. On review, the Federal Circuit affirmed the Board, holding that the jurisdiction of the Board is not plenary, but is limited to those actions which are made appealable to it by law, rule or regulation, and that the applicable statute provides only for review of a suspension order of more than 14 days. *Synan*, 765 F.2d at 1100. The Federal Circuit rejected the employee's alternative argument that the appeal should be transferred to a United States District Court because of lack of jurisdiction by the Federal Circuit, since an appellant is granted no rights to a trial *de novo* in a civil action under § 7702 or § 7703 until the discrimination issue and the appealable action have been decided on the merits by the Board. *Id.* at 1101.

Ballentine was the basis for *Synan*, and neither, in our view, is at odds with *Williams*.

Such cases as Covington v. Dep't of Health and Human Services, 750 F.2d 937 (Fed. Cir. 1984) and Christo v. Merit Systems Protection Bd., 667 F.2d 882 (10th Cir. 1981), relied on by Wall, are inapposite. In *Covington*, which does not involve alleged discrimination, the Board found "voluntary retirement," and, on appeal, the Federal Circuit held that because of misinformation the retirement was involuntary as a matter of law, and remanded the case to the Board for further proceedings. *Covington*, 750 F.2d at 944. As indicated, should the Federal Circuit reverse the Board's findings that Wall voluntarily retired, the matter presumably will be remanded to the Board with directions to hear the discrimination charge.

In *Christo*, the Board rejected a terminated employee's claim of discriminatory discharge, and the employee filed a civil rights case in the United States District Court for the District of Colorado and a petition for review of the Board's decision in this court (the statute at that time provided for review of the Board's action by a United States Court of Appeals or the Court of Claims). On a motion to dismiss, this court transferred the petition to the district court. In *Christo*, unlike the instant case, the Board admittedly had jurisdiction of the appeal and accordingly ruled on the discrimination claim on its merits.

We therefore hold that the Federal Circuit has exclusive jurisdiction to hear Wall's appeal from the Board's May 2 order that he voluntarily retired from the Department, and that his *de novo* action in the United States District Court for the District of Kansas was properly dismissed.

Judgment affirmed.

NO. 86-2004—RICHARD J. WALL v. UNITED STATES, et al.

SEYMOUR, Circuit Judge, dissenting.

I agree with the majority's conclusion that, under section 205 of the Civil Service Reform Act of 1978, 5 U.S.C. § 7703(b)(1) (1982), the Federal Circuit has exclusive jurisdiction to review the Board's ruling that it did not have an appealable order before it. The Board's decision that Wall's termination was "voluntary," and his action therefore not appealable, precluded the district court from exercising jurisdiction over Wall's discrimination claim pursuant to section 7703(b)(2) of that statute. However, I do not agree with the majority's conclusion that the district court had *no* jurisdiction over Wall's discrimination claims. Federal employees with discrimination claims are entitled to bring de novo actions in federal district court under the relevant civil rights statutes. Wall filed this action directly under the Age Discrimination in Employment Act, 29 U.S.C. § 633a(c) (1982), and the Rehabilitation Act of 1973, 29 U.S.C. § 749a (1982). For the reasons set out below, I am convinced that the district court had jurisdiction over Wall's action under those statutes. Because I conclude that the result reached by the majority is contrary to both the spirit and the language of the statutes at issue, I must respectfully dissent.

On August 17, 1984, the director of Wall's division of the Department of Health and Human Services gave him a notice of proposed termination. Wall protested the decision to his regional director, Al Kemp, but on September 18, 1984, Kemp informed Wall in a written memorandum that the termination decision would become effective on September 28. This memorandum ad-

vised Wall that he could appeal the decision to the Board, and further stated:

> "*An appeal to the MSPB containing an allegation of discrimination (as defined in MSPB Regulations 1201.151(a)(2)) will not be processed concurrently with a discrimination complaint filed within the Department. Accordingly, if you believe that this action is based on such discrimination, you may*:
>
> 1. *Either* appeal to the MSPB within 20 calendar days after the effective date of the action taken against you, raising the matter of discrimination in your appeal to the MSPB (and otherwise complying with MSPB Regulation 1201.153), *or*
>
> 2. File a discrimination complaint within the Department . . .; but you must, if you wish to file a discrimination complaint, first consult an Equal Employment Opportunity (EEO) Counselor within 30 calendar days after you receive the decision.

Rec., vol. I, doc. 6, ex. B (emphasis added). Wall chose the first option and appealed the allegedly discriminatory decision to the Board.

I.

As set out below, the statutes governing appeals to the Board make clear that appeals decided by the Board involving discrimination are entitled to de novo judicial review. Cases in which an employee both challenges an action that is appealable to the Board and alleges discrimination are termed mixed cases. *See Christo v. Merit Systems Protection Board*, 667 F.2d 882, 883-84

(10th Cir. 1981). Such cases are appealed to the Board under 5 U.S.C. § 7702(a)(1) (1982), which states:

> "(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—
>
> (A) *has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board,* and
>
> (B) alleges that a basis for the action was discrimination prohibited by—
>
> (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),
>
> (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
>
> (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
>
> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
>
> (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,
>
> the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section."

Adverse actions that may be appealed to the Board under the above-italicized language are narrowly defined,

and include only removal, suspension for more than fourteen days, reduction in grade or pay, and furlough of thirty days or less. *See Williams v. Dept. of the Army*, 651 F.2d 243, 244 (4th Cir. 1981) (per curiam). As the majority notes, they do not cover a "voluntary" retirement, even when made under the threat of removal.[1] *See Christie v. United States*, 518 F.2d 584, 588 (Ct. Cl. 1975).

Judicial review of Board decisions involving discrimination claims is governed by the following provisions. Section 7702(a)(3)(A) states that "[a]ny decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of . . . the date of issuance of the decision . . . ." Section 7703(b)(2) provides:

> "Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under section 7702."

5 U.S.C. § 7703(b)(2). Under these provisions, mixed cases in which discrimination is an issue, are reviewed

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1. Wall, of course, did not know his action was not appealable and thus not covered by section 7702(a)(1) until after he had chosen to appeal via that section and the Board found his termination voluntary.

de novo in federal district court. *See Christo v. Merit Systems Protection Bd.*, 667 F.2d 882, 885 (10th Cir. 1981). Judicial review of Board decisions in which discrimination is *not* an issue is obtained in the Federal Circuit.

> "Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board."

5 U.S.C. § 7703(b)(1).

II.

If Wall had chosen the second option set out in the Kemp memorandum and filed a discrimination claim with his department, he would have followed the procedures for filing age and handicap discrimination claims. *See generally*, 29 C.F.R. §§ 1613.211-.283; 1613.501-.514; 1613.-701-.709 (1987). An examination of the relevant civil rights statutes and associated regulations reveals that if Wall had pursued this option, he would have been entitled to de novo judicial review.

It is apparent that Congress intended the Civil Service Reform Act provisions and the civil rights statutes to be read together to provide "a unified, coherent Federal structure to combat job discrimination in all its forms." Message of the President accompanying Reorg. Plan No. 1 of 1978, 3 C.F.R. 32, (1978), *reprinted in* 5 U.S.C. App. at 1155 (1982), *and in* 92 Stat. 3781 (1978). Confusing

overlap and duplication were meant to be eliminated. The thrust behind these statutes and associated administrative enforcement procedures is

> "to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The Federal government must not fall below the standard of performance it expects of private employers."

Id.

In this case, Wall asserted that his resignation was involuntary due to discrimination both on the basis of physical handicap and on the basis of age. Under the Rehabilitation Act of 1973, which governs claims of handicap discrimination against the Federal government, a federal employee asserting such a claim may file a civil action as provided by Title VII within thirty days of final agency action on his claim.[2] *See* 29 U.S.C. § 794a(a)(1) (1982); 42 U.S.C. § 2000e-16(c) (1982). The claimant is entitled to de novo judicial consideration in such an action. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 303 (5th Cir. 1981). A federal worker alleging age discrimination has two options. He may either forego agency action and file a civil suit after giving the EEOC thirty days notice of his intent to file, or he may seek administrative relief. *See* 29 U.S.C. § 633a(c), (d) (1982); *see also Langford v. United States Army Corps of Engi-*

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2. Wall filed his claim in the district court within thirty days of the Board's decision dismissing his case.

neers, 839 F.2d 1192, 1193-94 (6th Cir. 1988); *Purtill v. Harris,* 658 F.2d 134, 138 (3d Cir. 1981), *cert. denied sub nom. Purtill v. Heckler,* 462 U.S. 1131 (1983).[3] If an employee chooses to first seek administrative relief, the subsequent judicial proceeding is an action de novo. *See Rosenfeld v. Dep't of the Army,* 769 F.2d 237 (4th Cir. 1985); *Nabors v. United States,* 568 F.2d 657, 658 (9th Cir. 1978); *see also Duggan v. Bd. of Educ.,* 818 F.2d 1291, 1297 (7th Cir. 1987) (unreviewed state or local agency fact findings not given preclusive effect); *but see Stillians v. State of Iowa,* 843 F.2d 276, 282 (8th Cir. 1988) (2-1 decision) (unreviewed state agency findings entitled to preclusive effect).

These civil rights statutes, when read together with the provisions of the Civil Service Reform Act set forth above, manifest a clear Congressional directive that a federal employee seeking administrative relief on a discrimination claim be provided de novo judicial review. An employee may obtain such review by filing suit in federal district court within thirty days of final agency action on the claim, whether the final agency action consists of resolution of a mixed case by the Board, or rejection of the claim by the claimant's agency. *See* S. Rep. No. 969, 95th Cong., 2d Sess. 63, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2785.

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3. There is a split of authority on whether a plaintiff who chooses to first seek an administrative remedy must obtain final agency action in his claim before filing suit. *Compare Langford,* 839 F.2d at 1193-94 *with Purtill,* 658 F.2d at 138.

III.

The Board found that Wall's termination was voluntary.[4] It then ruled that because a voluntary termination is not an action which may be appealed to the Board, it had no jurisdiction under section 7702(a)(1) to decide the discrimination claim. The majority concludes that Wall may only appeal the finding of lack of jurisdiction, and that this appeal must be taken in the Federal Circuit. In so concluding, however, the majority appears to equate the issue of voluntariness, which underlies the jurisdictional question, with the claim of discrimination. *See* slip op. at 7. If the two issues are in fact one and the same, that issue is whether the alleged discrimination resulted in a constructive discharge, i.e., an involuntary termination. Requiring Wall to appeal the Board's resolution of this issue in the Federal Circuit deprives him of de novo review of his discrimination claim in district court, a result contrary to the statutes and our holding in *Christo*.

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4. The Board here set out its standard for voluntariness as follows:

> "Although employee-requested actions are presumed to be voluntary, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), this presumption will not prevail if the employee comes forward with sufficient evidence to show that the disputed action was involuntarily extracted or coerced. The standards for determining duress are set forth in *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953), as follows:
>
> (1) that one side involuntarily accepted the terms of another;
>
> (2) that circumstances presented no other alternative; and
>
> (3) that said circumstances were the result of coercive acts of the opposite party."

Rec., vol. I, doc. 6, ex. H, at 2.

The Government, on the other hand, appears to argue that the issue of jurisdiction is a "threshold" issue unrelated to the discrimination claim. Accordingly, the Government asserts that Wall is only entitled to judicial review of this decision, and that review is there[illegible] exclusively in the Federal Circuit. Apart from the conceptual difficulty of separating the issues of voluntariness and discriminatory constructive discharge,[5] under the

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5. It is unclear what relationship, if any, exists between the Board's finding of voluntary retirement and Wall's discrimination claims. Board "voluntariness" is arguably relevant to either a claim of constructive discharge, a defense of waiver, or both. Although their standards vary, the circuits are in general agreement that the doctrine of constructive discharge is available to a civil rights plaintiff. *See Derr v. Gulf Oil Co.*, 796 F.2d 340, 343 (10th Cir. 1986). In the Tenth Circuit, "the question on which constructive discharge cases turn is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Id.* at 344. If, as the majority seems to suggest, the Board's finding of voluntariness is a determination of whether the agency here created an intolerable work environment by telling Wall he was to be terminated, the Board has without question resolved the merits of the alleged constructive discharge.

The courts also recognize that a victim of discrimination may waive his right to seek relief under the civil rights acts by entering into a settlement with his employer. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 & n.15 (1974); *Cox v. Allied Chemical Corp.*, 538 F.2d 1094, 1097-98 (5th Cir. 1976), *cert. denied sub nom. Allied Chemical v. White*, 434 U.S. 1051 (1978); *Bernstein v. Consolidated Foods Corp.*, 622 F.Supp. 1096, 1105-06 (N.D. Ill. 1984). However, [i]n determining the effectiveness of any such waiver, a court would have to determine that the employee's consent to the settlement was voluntary *and knowing.*" *Alexander*, 415 U.S. at 52 n.15 (emphasis added).

The Board decision in this case found that "the agency's personnel specialists clearly did not inform appellant that he would be precluded from exercising his appeal rights to the adverse action if he selected a retirement date effective the same date as that action." Rec., vol. I, doc. 6, ex. H, at 5. In ruling that Wall's decision was voluntary despite his lack of knowledge of the rights he was giving up, the Board clearly employed a standard inconsistent with that required to ascertain whether

(Continued on following page)

Government's analysis, as it candidly admits, a person in Wall's position may be unable to raise his discrimination claim in any judicial forum. I cannot accept the Government's conclusion that Congress intended federal employees to be without a remedy in this situation. The Government has presented no compelling statutory construction or policy argument to support such a result, and it is clearly contrary to the Congress' express intent that federal workers' rights and remedies under the civil rights statutes are to be fully protected. *See* H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2874-75.

IV.

The Government argues that Wall has failed to exhaust administrative remedies with respect to the discrimination claims because the agency has not had an opportunity to address them. An argument can be made, however, that these claims have in fact received administrative consideration. See note 5 supra. Moreover, as set out above, Wall was told by his agency that he could either raise his discrimination claims in his appeal to the Board, or file a complaint with the agency, but not both. These instructions mirror the regulations issued by the EEOC controlling the administrative processing of mixed cases. *See* 29 C.F.R. 1613.403. The regulations thus provide *alternative means* by which an employee such as Wall,

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Footnote continued—

he waived a cause of action for discrimination. Moreover, an employer who alleges that a civil rights plaintiff has waived his right to proceed with his discrimination claim is asserting an affirmative defense to that claim. To the extent that the Board's decision was a ruling on this issue, the decision is, contrary to the Government's argument, a disposition of the merits of Wall's claim on an issue Wall is entitled to have reviewed de novo in district court.

who contends that his resignation was the involuntary result of illegal discrimination, can exhaust his administrative remedies. Wall pursued his claims with the Board, and its decision that it had no jurisdiction to consider those claims became final on May 7, 1985, long after the thirty-day period had expired within which Wall was required to initiate a discrimination complaint with the agency. *See* 29 C.F.R. § 1613.214(a). Even assuming that the agency would have extended the filing time, *see id.* at § 1613.214(a)(4), by establishing alternative procedures for pursuing administrative relief, the regulations make clear that pursuing either alternative is sufficient to exhaust administrative remedies. *See id.* at § 1613.421.

Under the Government's argument, an employee such as Wall would have to undertake administrative relief twice, inevitably beginning his second attempt after the time to do so had run, a result that defies logic and congressional intent to eliminate confusing overlap and duplication. Because Wall was clearly entitled to present his claims to the Board instead of filing a discrimination complaint with his agency, the Board's ruling that Wall's resignation was voluntary is final agency action on those claims for purposes of triggering Wall's right to de novo judicial review under the applicable civil rights statutes.

V.

Accordingly, I would hold that Wall is entitled to judicial review of his discrimination claims in district court. In so doing, I recognize that Wall would then have two parallel judicial actions arising from one administrative proceeding, a result we disapproved in *Christo*, 667 F.2d at 885. However, given the instant circumstances, such a consequence is the unavoidable outcome of insur-

ing Wall's statutory right to de novo review of his discrimination claims. The Federal Circuit has taken steps to ameliorate the duplication by holding Wall's appeal in that court in abeyance pending our resolution here. The Federal Circuit could choose to continue this course of action until Wall's discrimination claims have been disposed of, and then take whatever action it deems proper in light of their disposition.

For these reasons, I dissent.

(Filed June 3, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 85-2307

RICHARD J. WALL,
Plaintiff,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, OTIS BOWEN; MERIT SYSTEMS PROTECTION BOARD; and HERBERT ELLINGWOOD,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on the motion of defendants Department of Health and Human Services [hereinafter the Department] and Otis Bowen to dismiss for lack of subject matter jurisdiction, and the motion of defendants Merit Systems Protection Board [hereinafter MSPB] and Herbert Ellingwood to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiff has requested that the court hear oral argument on defendants' motions. Because we do not find that oral argument would be beneficial in this case, plaintiff's request will be denied.

This is an action brought by a former employee of the Department pursuant to the Age Discrimination in

Employment Act, 29 U.S.C. §§621, *et seq.*, and the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§701, *et seq.* Plaintiff was employed by the Department from 1973 to September 28, 1984, as an Intergovernmental and Congressional Affairs Specialist. On September 18, 1984, the Department informed plaintiff of its decision to remove him from his position because of his physical disability. Plaintiff's removal was to become effective September 28, 1984. Plaintiff conferred with Employee Relations Specialists at the Department concerning his retirement rights. Plaintiff's complaint alleges that they furnished him with misleading information and, based on this information, he executed an application for retirement with an effective date of September 28, 1984.

Thereafter, plaintiff filed an appeal with the MSPB claiming that his retirement was involuntarily extracted and that the Department's actions had discriminated against him on the basis of his age and handicap. After conducting a hearing, the MSPB found that plaintiff's retirement was voluntary and, consequently, it did not have jurisdiction to hear plaintiff's appeal. Plaintiff petitioned for review of the MSPB's decision. The MSPB denied the petition and its initial decision became a final order. Plaintiff then contemporaneously filed this action in district court and filed a petition for review of the MSPB's order in the United States Court of Appeals for the Federal Circuit. After defendants in this action filed the motions to dismiss presently before the court, plaintiff moved the Federal Circuit for a stay of the appellate proceedings pending our determination of these motions. The Federal Circuit stayed its proceedings pending a ruling of this court and the Tenth Circuit Court of Appeals.

I. *Motion to Dismiss by Defendants Department of Health and Human Services and Otis Bowen.*

Defendants move to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Plaintiff argues in his memorandum that defendants' motion should be treated as one for summary judgment because defendants have submitted matters outside the pleadings. Plaintiff's argument is clearly erroneous. The court may consider matters outside the pleadings under any motion made pursuant to Rule 12(b), with the exception of 12(b)(6), without converting it to a motion for summary judgment. 5 Wright and Miller, *Federal Practice and Procedure* §1350 at 547, 549-50, §1364 at 668, §2713 at 592-93. *See also Thompson v. United States*, 291 F.2d 67, 68 (10th Cir. 1961). Consequently, any arguments by plaintiff that resolution of this motion turns on a genuine issue of material fact are not relevant. The only issue before us at this time is whether this court, rather than the Federal Circuit Court of Appeals, has jurisdiction of plaintiff's action.

The Federal Courts Improvement Act of 1982 provides that the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction "of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to section 7703(b)(1) . . . of Title 5." The Federal Circuit, pursuant to section 7703(b)(1), has jurisdiction over appeals from the MSPB *except* insofar as section 7703(b)(2) provides that:

> Cases of discrimination *subject to the provisions of section 7702* of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C.

> 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

5 U.S.C. §7703(b)(2) (emphasis added).

Section 7702 defines the types of "cases of discrimination" which are excluded from the jurisdiction of the Federal Circuit as follows:

> (a)(1) . . . the case of any employee or applicant for employment who—
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> (A) has been affected by *an action which the employee or applicant may appeal to the Merit Systems Protection Board*, and
>
> (B) alleges that a basis for the action was discrimination prohibited by—
>
> (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),
>
> (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
>
> (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
>
> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
>
> (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph.

5 U.S.C. §7702 (emphasis added).

Thus, a case under section 7702 must involve an adverse personnel action affecting a federal employee that

is appealable to the MSPB and an allegation that a basis for the action was discrimination within one of the categories listed above. *Williams v. Department of Army*, 715 F.2d 1485, 1487 (Fed. Cir. 1983). Cases falling within section 7702 have been termed "mixed." *Ballentine v. Merit Systems Protection Board*, 738 F.2d 1244, 1245 (Fed. Cir. 1984); *Williams*, 715 F.2d at 1487 and n.3.

Consequently, to decide whether this court has jurisdiction over this action, we must determine whether this is a "mixed" case. If it is a mixed case, this court has jurisdiction; if not, the Federal Circuit has exclusive jurisdiction. It is clear that plaintiff alleges discrimination within one of the categories set forth in section 7702. It is not clear, however, whether the job action of which plaintiff complains is of the type that may be appealed to the MSPB.

Plaintiff appealed to the MSPB the Department's action of "involuntarily retiring" plaintiff from his position as an Intergovernmental and Congressional Affairs Specialist. The MSPB made a factual finding that plaintiff's retirement was voluntary. As a matter of law, a voluntary retirement is not subject to the MSPB's appellate review. *Christie v. United States*, 518 F.2d 584, 589 (Ct. Cl. 1975); 5 C.F.R. 752.401(c)(3) (1984). The MSPB therefore concluded that it was without jurisdiction to hear plaintiff's appeal.

In light of the foregoing, it is clear that plaintiff's case is not a "mixed" case falling within the provisions of section 7702. Consequently, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over plaintiff's case pursuant to section 7703(b)(1). Plaintiff contends, however, that he is entitled to a de novo determination by this court of whether his retirement

was in fact voluntary and consequently not appealable before the MSPB. We find plaintiff's argument meritless.

In *Ballentine v. Merit Systems Protection Board*, 738 F.2d 1244 (Fed. Cir. 1984), the Federal Circuit held that it, rather than the district court, had jurisdiction over a plaintiff's case in an action similar to the one at bar. In *Ballentine* an aggrieved employee appealed his demotion to the MSPB. The MSPB held that it lacked jurisdiction over the case based on the statute of limitations issues. The employee appealed the MSPB's decision to the Federal Circuit. The MSPB moved to dismiss on the ground that the district court rather than the Federal Circuit had jurisdiction over the action. The Federal Circuit noted that "threshold issues such as the MSPB's own jurisdiction arise continually on appeal to this court, and we have taken jurisdiction over these cases . . . ." *Id.* at 1246-47.

The court went on to state that an appellant is entitled to a trial de novo in the district court *only after* the MSPB has decided on the merits both the discrimination issue and the appealable action issue. The court stated:

> [I]t is clear that the judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action . . . ." § 7702(a)(1). When an appeal has been taken to the MSPB, until the discrimination issue and the appealable action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703.

Id. at 1246.

To allow an aggrieved employee to take his claim to the district court before the Federal Circuit had the opportunity to determine whether the MSPB had jurisdiction would result:

> not only in a waste of time and resources, but also in lack of uniformity as each of some 94 different federal district courts (with appeals to their respective circuits) proceeds to define the metes and bounds of MSPB jurisdiction. Congress sought to avoid such consequences by consolidating appellate jurisdiction over MSPB cases in a single court—the Federal Circuit.

Id. at 1247 (quoting *Granado v. Department of Justice*, 721 F.2d 804, 810 (Fed. Cir. 1983)).

The Federal Circuit in *Synan v. Merit Systems Protection Board*, 765 F.2d 1099 (Fed. Cir. 1985), reiterated its holding in *Ballentine*. The court held that it had jurisdiction to review the threshold issue of the MSPB's jurisdiction in a discrimination case. Consequently, the court refused to transfer the action to the district court. *Id.* at 1101-02.

In plaintiff's case, as in *Ballentine* and *Synan*, the only issue addressed by the MSPB was whether it had jurisdiction to hear the employee's appeal. The MSPB found that it had no jurisdiction because plaintiff's separation was the result of his voluntary retirement and not a coerced involuntary retirement or removal. Similarly in this case, as in *Ballentine* and *Synan*, the MSPB did not address the merits of plaintiff's claims of discrimination against the agency. In sum, the applicable statutes and case law clearly require that in a case such as the present one, when an employee has appealed to the MSPB and the MSPB's decision involves only a threshold issue, such

as its jurisdiction, judicial review is available only in the Federal Circuit Court of Appeals and not the federal district court.

Plaintiff argues in his supplemental memorandum that 5 U.S.C. §7702(e)(3) mandates that he be given a trial de novo and, consequently, that this court has jurisdiction. Section 7702(e)(3) provides:

> Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section *after a judicially reviewable action* . . . .

5 U.S.C. §7702(e)(3) (emphasis added).

Plaintiff overlooks the fact that this subsection provides for a trial de novo only of a "judicially reviewable action." The Federal Circuit in *Ballentine* stated that in order to be "judicially reviewable" the MSPB must decide both the issue of discrimination and the appealable action. 738 F.2d at 1246 (quoting 5 U.S.C. §7702(a)(1)). Consequently, when the aggrieved employee appeals the personnel action to the MSPB, the employee has no rights to a trial de novo until the MSPB decides on the merits the discrimination issue *and* the appealable action. *Id.* at 1246. As discussed above, the MSPB never addressed the merits of plaintiff's discrimination claims. We therefore conclude that subsection 7702(e)(3) is inapplicable in this case.

In conclusion, we hold that this court lacks subject matter jurisdiction to hear plaintiff's case at this time. We note, however, that our holding does not permanently deprive plaintiff of the right to further pursue his discrimination claims. Plaintiff currently has an appeal of the MSPB's order pending before the Federal Circuit. If

the Federal Circuit reverses the MSPB's decision and determines that plaintiff's retirement was in fact involuntary, plaintiff's case would be remanded to the MSPB. The MSPB would then address the merits of plaintiff's discrimination claims. If the MSPB found that he had not been discriminated against, plaintiff would have the opportunity to seek de novo review in this court.

II. *Motion to Dismiss by Defendants Merit Systems Protection Board and Herbert Ellingwood.*

Because we have concluded that we lack subject matter jurisdiction to hear this action, defendants' motion need not be addressed.

IT IS THEREFORE ORDERED that the motion to dismiss by defendants Merit Systems Protection Board and Herbert Ellingwood is denied as moot.

IT IS FURTHER ORDERED that the motion to dismiss this action for lack of subject matter jurisdiction by defendants Department of Health and Human Services and Otis Bowen is granted.

Dated this 3rd day of June, 1986, at Kansas City, Kansas.

/s/ Earl E. O'Connor
Earl E. O'Connor, Chief Judge

(January 18, 1985)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CASE NUMBER: SL07528510018
DECIDED ON: JANUARY 18, 1985

RICHARD J. WALL
Appellant

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Agency

INTRODUCTION

By petition timely filed, appellant sought to appeal his allegedly involuntary retirement from the position of Intergovernmental and Congressional Affairs Program Specialist, effective September 28, 1984.

JURISDICTION

The threshold issue in this case is whether there has been a personnel action effected against the appellant which is appealable to the U.S. Merit Systems Protection Board (the Board) under any law, rule or regulation. 5 U.S.C. 7512 (1982); 5 C.F.R. 1201.3 (1984). A retirement, if voluntary, is not subject to the Board's appellate review. 5 C.F.R. 752.401(c)(3) (1984).[1]

1. It is well settled that the voluntary nature of a requested action on the part of an employee is an issue of fact. *McGucken v. United States*, 407 F.2d 1349 (Ct. Cl. 1969). *See also Wilson v. Department of Health and Human Services*, 5 MSPB 172, 173 (1981).

Although employee-requested actions are presumed to be voluntary, *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975), this presumption will not prevail if the employee comes forward with sufficient evidence to show that the disputed action was involuntarily extracted or coerced. The standards for determining duress are set forth in *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953), as follows:

> (1) that one side involuntarily accepted the terms of another;
>
> (2) that circumstances presented no other alternative; and
>
> (3) that said circumstances were the result of coercive acts of the opposite party.

The record here reveals that, based on appellant's unequivocal request, his separation from employment was processed as a retirement action rather than as a removal action. *See* Standard Forms (SF) 50 dated September 27 and October 23, 1984, Appeal File, Tab 3(8).

The appellant first claims that his retirement was involuntary because the agency had decided to remove him from his position for cause. It is undisputed by the parties that a decision had been issued by the agency to remove appellant effective September 28, 1984. However, the courts have repeatedly upheld the voluntariness of resignations and retirements where they were submitted to avoid possible removal for cause. *Christie v. United States*, 518 F.2d at 588; *Pitt v. United States*, 420 F.2d 1028 (Ct. Cl. 1970). The threat of removal, of course, must be for good cause in order for the resignation to be binding. *Autera v. United States*, 389 F.2d 815, 817 (Ct. Cl. 1968). The good cause requirement

is met, however, as long as the appellant fails to show that the agency knew or believed that the removal action could not be substantiated. *Leone v. United States*, 204 Ct. Cl. 334, 340 (1974). Here, while appellant has expressed a desire to appeal the merits of the agency's action if the matter is found to be within the Board's jurisdiction, he has not demonstrated, or even argued, that the agency knew or believed that its removal action could not be substantiated. Accordingly, I find that the decision of the appellant to retire was not, at least legally, rendered involuntary simply because appellant was to be removed.

Appellant additionally alleges that he selected a retirement date of September 28, 1984, based on agency misrepresentation. He testified that during extensive counseling sessions with agency personnel specialists, he was never informed that if he selected as the effective date of his retirement the scheduled effective date of the removal for cause, he would lose his appeal rights. Transcript (Tr.) 98, 104, 120.[2] Finally, appellant testified that had he known he would lose his appeal rights, he would have taken appropriate action to preserve them by selecting a retirement date after the scheduled effective date of separation for cause. Tr. 126-127.

Sharon Murphy, Employee Relations Specialist, Department of Health and Human Services, Kansas City, Mis-

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2. There is no dispute among the parties concerning the legal principle that where a *voluntary* resignation or retirement is effective on the same date as a scheduled adverse action, and the action actually processed is a resignation or retirement, no appeal rights flow therefrom. *See generally Lematta v. Department of Health and Human Services*, MSPB Docket No. SL035-18410023 (July 18, 1984); *Knox v. Equal Employment Opportunity Commission*, MSPB Docket No. CH07528110583 (October 15, 1983).

souri, testified that at a retirement counseling session, appellant asked her what was the last possible day he could retire prior to the removal action being effected. Murphy testified that she told appellant that the last date was September 28, 1984, the scheduled effective date of the removal for cause, and that if he chose that date, the separation action would be processed as a retirement, not a removal for cause. Tr. 15-16, 48, 51. Murphy further testified that the date an employee selects for retirement governs the effective date of such retirement, and that any date may be so designated. Tr. 17, 19. Murphy admitted that she had not informed appellant of the impact or effect that a retirement on the effective date of the scheduled removal would have on his appeal rights. Tr. 32, 38-39. Finally, she testified that she was not then aware that selection by appellant of September 28, 1984, as a retirement date, would adversely affect his appeal rights. Tr. 55-57.

Lovia Riding, another agency Employee Relations Specialist, testified that she counseled appellant on several occasions about retirement. She testified that in discussions with appellant on September 26 or 27, 1984, he appeared concerned about not having negative information appear on the Standard Form (SF) 50 which would be prepared recording the action, with receiving an immediate annuity, and with preserving his health and life insurance benefits. Tr. 70-71, 84, 140-143. She also testified that agency policy is to accept an employee resignation if it is to be effective no later than the date of the scheduled removal action. Tr. 72. Riding also testified that, like Murphy, she was unaware, at the time she counseled appellant, that a retirement effective the same date as a removal action would preclude appellant

from appealing the latter matter. Thus, she did not counsel appellant on such point. Tr. 76-79, 146-147.

Based on the testimony of the pertinent witnesses, including appellant, I find that if any misrepresentation occurred, it could have only involved misrepresentation by omission rather than commission. That is, the agency's personnel specialists clearly did not inform appellant that he would be precluded from exercising his appeal rights to the adverse action if he selected a retirement date effective the same date as that action. Furthermore, although even the failure to provide information may be considered misleading, if detrimentally relied upon, *see Covington v. Department of Health and Human Services*, No. 84-976, slip op. (Fed. Cir. December 18, 1984), I do not find that the personnel specialists in any way affirmatively misled appellant into selecting September 28, 1984, as the effective date of his retirement. I find that appellant was notified on several occasions that he could select any date he wished as his retirement date and also that the date he selected might affect how his separation was processed. Thus, I further find that whether appellant was aware of the impact of selecting a retirement date of September 28, 1984, on his appeal rights, he was fully aware that if he did so, the personnel action separating him from the federal service would be processed as a retirement action, *not* a removal for cause. Accordingly, I do not find that appellant was provided with misleading information. *See generally Scharf v. Department of the Air Force*, 710 F.2d 1572 (1983) (in which the Court of Appeals for the Federal Circuit found, using an objective test, that an employee had justifiably relied on misleading advice to his detriment). To the contrary, the record reveals, and I find, that the focus of appellant's concerns

were with protecting his employment record, with timely obtaining retirement benefits and with preserving certain collateral benefits such as health and life insurance, and not with guaranteeing his appeal rights. Thus, I find that the personnel specialists had no particular reason to inform appellant of information which might serve to preserve his appeal rights.[3] In summary, based on all the arguments and evidence presented, I cannot find appellant to have been objectively misled by what was at most, a failure on the part of the agency's personnel specialists to volunteer information not directly requested by appellant or otherwise germane to his inquiries. *See also Lichtman v. Department of the Navy,* MSPB Docket No. DC-04328410013 (November 20, 1984). I therefore find that appellant's retirement was not involuntarily achieved through misrepresentation.

Accordingly, in view of the foregoing analysis and the record evidence, I find no basis for concluding that the agency utilized misrepresentation, duress, unreasonable time pressure or intimidation to force the appellant to retire. Therefore, I find that appellant was not affected by an adverse action appealable under 5 U.S.C. Chapter 75 (1984), and, consequently, that the petition for appeal does not raise a matter within the appellate jurisdiction of the Board.

DECISION

The appellant's petition for appeal is DISMISSED with prejudice.

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3. I find credible the testimonies of the two personnelists that they did not even know that the appellant's appeal rights could technically have been preserved by changing the effective date of the retirement. Tr. 55-57, 76-79, 146-147.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with:

Office of Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. 1201.114 - .115 (1984). The petition for review must be filed on or before February 22, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record. If a petition for review is filed, an informational copy of it should be forwarded to the St. Louis Regional Office.

This initial decision will become a final decision of the Board on February 22, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and .117 (1984).

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be *received* by the Court no later than thirty (30) days after the initial decision becomes final.

For the Board:

/s/ Jack E. Salyer
Jack E. Salyer
Presiding Official

(May 2, 1985)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER SL07528510018
DATE: MAY 2 1985

RICHARD J. WALL

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on January 18, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has

*See *Beaty v. Department of Agriculture, F.H.A.*, 24 M.S.P.R. 658, 661 (1984) (the Board does not have jurisdiction over a voluntary action such as retirement, and it will presume voluntariness absent evidence that misleading information promoting the retirement was furnished by agency officials); *Weaver v. Department of the Navy*, 2 MSPB 297, 298-99 (1980) (the Board accords substantial deference to the credibility determinations of its presiding officials, and findings and conclusions based on these determinations will not be disturbed absent a showing of a serious evidentiary issue based on supporting references to the record on appeal).

jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

(Filed May 24, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2004

RICHARD J. WALL,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Department of Health and Human Services, Otis Bowen, MERIT SYSTEMS PROTECTION BOARD, HERBERT ELLINGWOOD,
Defendants-Appellees.

ORDER

Before HOLLOWAY, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, McWILLIAMS, Circuit Judges, and LUTHER L. BOHANON, District Judge.*

Appellant's petition for rehearing is denied by the panel of judges to whom the case was argued and submitted. Judge Seymour would grant rehearing.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all

*Honorable Luther L. Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

judges in regular active service. No judge in regular active service nor any panel member having called for a poll, the suggestion for rehearing en banc is also denied.

Entered for the Court

ROBERT L. HOECKER, Clerk
By: /s/ PATRICK FISHER
PATRICK FISHER
Chief Deputy Clerk

STATUTORY PROVISIONS INVOLVED

5 U.S.C. §7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

* * *

5 U.S.C. §7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

* * *

5 U.S.C. §7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

* * *

29 U.S.C. §794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall

be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

* * *

42 U.S.C. §2000e-16. Employment by Federal Government

* * *

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department,

agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * *

Supreme Court, U.S.
FILED
DEC 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-317

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD J. WALL, PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
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13 pp

QUESTION PRESENTED

After the Merit Systems Protection Board held that it had no jurisdiction over petitioner's claim of discriminatory discharge, petitioner filed an action in a federal district court alleging discrimination by the employer agency. The question presented is whether the court of appeals was correct in affirming the district court's dismissal of the action.

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RICHARD J. WALL, PETITIONER

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UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A1-A19) is reported at 871 F.2d 1540. The memorandum and order of the district court (Pet. App. A20-A28) is reported at 637 F. Supp. 90. The initial opinion of the Merit Systems Protection Board (Pet. App. A29-A35) is unreported; the Board's order denying the petition for review of the initial decision (Pet. App. A36-A37) is summarily reported at 27 M.S.P.R. 647.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1989. The court of appeals denied a petition for rehearing en banc on May 24, 1989. The petition for a writ of certiorari was filed on August 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the Department of Health and Human Services (HHS) as an Intergovernmental and Congressional Affairs Specialist from 1973 to September 28, 1984. Pet. App. A21. On September 18, 1984, HHS informed petitioner of its decision to remove him from his position effective September 28, 1984. *Ibid.* Thereafter, petitioner conferred with HHS Employee Relations Specialists concerning his retirement rights. *Ibid.* During these meetings, petitioner discussed his desire to protect his employment record, to obtain timely retirement benefits, and to preserve his insurance coverage. *Id.* at A33-A34. He agreed to select a retirement date, and inquired as to the last possible day he could retire prior to his removal. He was told that he could retire on September 28 and that if he did so, the separation would be processed as a retirement rather than a removal for cause. *Id.* at A31-A32. On September 27, 1984, petitioner filed a Standard Form 50, requesting separation from employment by retirement effective September 28, 1984. *Id.* at A30. HHS processed petitioner's removal as a retirement.

2. Petitioner filed an appeal with the Merit Systems Protection Board (MSPB or Board), alleging that his retirement was involuntary because HHS had decided to remove him for cause and because the Employee Relations Specialists did not inform him that retiring on September 28 would cause him to lose his appeal rights. Pet. App. A29-A31. After reviewing the record and hearing the testimony of petitioner and the Employee Relations Specialists, the Board determined that the retirement was voluntary.[1] The Board

[1] The Board rejected petitioner's claim that the agency's decision to remove him rendered his retirement involuntary, noting that "the courts have repeatedly upheld the voluntariness of resignations and retirements where they were submitted to avoid possible removal for cause." Pet.

held that since there had been no adverse action taken against petitioner by HHS, it had no jurisdiction to hear petitioner's appeal. *Id.* at A29, A30-A34.

3. Petitioner appealed the Board's decision to the Federal Circuit pursuant to 5 U.S.C. 7703(b)(l) (1982). Pet. App. A21. Petitioner also filed an action in the United States District Court for the District of Kansas, claiming that his termination amounted to age and handicap discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* Pet. App. A20-A21. The Federal Circuit stayed the proceedings before it pending the outcome of the district court action. *Id.* at A21.

The district court observed that it had jurisdiction over petitioner's claim under 5 U.S.C. 7703(b)(2) (1982) only if petitioner had presented a "mixed" claim – that is, a claim that was appealable to the MSPB and that alleged discrimination by the agency. Otherwise, "the Federal Circuit has exclusive jurisdiction." Pet. App. A24. The court then noted that, although petitioner's claim included an

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App. A30 (citations omitted). The Board observed that petitioner's resignation would be binding only if his removal was for good cause, but held that the good cause requirement was satisfied unless petitioner could show "that the agency knew or believed that the removal action could not be substantiated." *Id.* at A31 (citations omitted). Because petitioner had not met this standard, the Board found that "the decision of the appellant to retire was not, at least legally, rendered involuntary simply because appellant was to be removed." *Ibid.*

The Board also found that, although the Employee Relations Specialists did not inform petitioner that his decision to retire on the day he was to be terminated would preclude any appeal of the agency's action (see Pet. App. A31 n.2, A32-A33), he nonetheless was informed that a retirement on the date he selected would result in his separation "be[ing] processed as a retirement action, *not* a removal for cause." Accordingly, the Board found that petitioner's decision to retire was not rendered involuntary by any misrepresentation. *Id.* at A33.

allegation of discrimination, the case was "not a 'mixed' case falling within the provisions of section 7702" because "[t]he MSPB made a factual finding that plaintiff's retirement was voluntary," and "[a]s a matter of law, a voluntary retirement is not subject to the MSPB's jurisdiction." *Ibid.* Therefore, the court concluded, the Federal Circuit had exclusive jurisdiction to review the Board's determination that the resignation was voluntary and that the Board lacked jurisdiction over the claim. *Ibid.* The district court dismissed the claim for lack of jurisdiction. *Id.* at A28.

4. Petitioner appealed the district court's decision to the Tenth Circuit, and the Tenth Circuit affirmed. Pet. App. A4-A19. The court of appeals majority agreed with the district court's reading of Section 7703(b)(2) as requiring that where "an employee's appeal to the [MSPB] is 'not appealable' under the statute, and the Board does not consider the employee's claim of discrimination on the merits, review of the Board's determination that it lacks jurisdiction to hear the employee's claim lies exclusively in the Federal Circuit." Pet. App. A5.[2] The majority concluded that petitioner's de novo action in the district court "was properly dismissed." *Id.* at A7.

Judge Seymour dissented, concluding that "[r]equiring Wall to appeal the Board's resolution of this issue in the Federal Circuit deprives him of de novo review of his discrimination claim in district court, a result contrary to

[2] The court of appeals also stated that, if the Federal Circuit on appeal "reverses the Board's determination that Wall's retirement was voluntary, the matter will then be remanded to the Board to hear Wall's discrimination claim on the merits." Pet. App. A5. If the MSPB on remand issued a ruling adverse to petitioner, petitioner could then file an action in district court. "It would seem to follow," the court concluded, "that should the Federal Circuit on appeal uphold the Board's finding that Wall voluntarily retired, such would rule out any claim of discrimination." *Id.* at A6.

statutes." Pet. App. A15. She noted that the majority's analysis would result in a "person in Wall's position [being] unable to raise his discrimination claim in any judicial forum." *Id.* at A17. She concluded that there was no "compelling statutory construction or policy argument" to support the majority's view that Congress intended federal employees to be "without a remedy in this situation." *Ibid.*

Judge Seymour also acknowledged the government's argument that the district court had properly dismissed the action because petitioner had failed to fulfill the prerequisite of exhausting his administrative remedies by filing a claim with the agency.[3] Pet. App. A17. Although the thirty-day period established by regulation for presenting his claim of discriminatory termination to HHS had long since expired (see 29 C.F.R. 1613.214(a)), Judge Seymour concluded that petitioner had satisfied the requirement of administrative exhaustion under the regulations by following an "alternative procedure[ ] for pursuing administrative relief"—filing a timely claim with the MSPB under 5 U.S.C. 7702(a)(1). Pet. App. A18.

ARGUMENT

This case does not warrant further review. Because the district court properly dismissed petitioner's action for discrimination, the court of appeals' decision affirming dismissal of that action was correct. Moreover, petitioner still has ample opportunity to obtain what he seeks: con-

[3] See 42 U.S.C. 2000e-16(c), as incorporated by reference in the Rehabilitation Act of 1973 (29 U.S.C. 794a); Section 15(d) of ADEA, 29 U.S.C. 633a(d) (requiring that a complaint be filed with the agency, or that the EEOC be notified, before an action is filed in federal court). See also 29 C.F.R. 1613.212-1613.214 (requiring that a complaint to the agency be filed within thirty days of the discriminatory personnel action).

sideration on the merits of his claim of age and handicap discrimination.

1. Although we do not fully agree with the court of appeals' reasoning,[4] its affirmance of the district court's dismissal of petitioner's action is correct because petitioner did not fulfill the prerequisites for his lawsuit. The relevant regulations require that before filing a suit alleging age or handicap discrimination, a claimant must consult with an Equal Employment Opportunity Counselor and must file a complaint with the employing agency within 30 days of the alleged discriminatory event. 29 C.F.R. 1613.213, 1613.214. Petitioner failed to comply with these requirements, and the district court therefore could not have entertained his lawsuit at the time it was filed.[5]

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[4] The court of appeals correctly concluded that, if the MSPB lacked jurisdiction over petitioner's action, his claim was not a "mixed" claim falling under Section 7702(a). The court then reasoned that, because Section 7703(b)(2) confers district court jurisidiction over "mixed" claims, it follows that Section 7703(b)(2), *ex proprio vigore*, deprives the district court of jurisdiction over any discrimination claim filed with the MSPB that turns out not to be a "mixed" claim within the Board's jurisdiction. We believe, however, that such a claim—although mistakenly characterized as mixed by the complainant—is in fact a "pure" discrimination claim over which the district court has de novo jurisdiction (subject to administrative exhaustion requirements) under Section 717(c) of Tit. VII, 42 U.S.C. 2000e-16(c), as applied to the Rehabilitation Act of 1973, and Section 15(c) of ADEA, 29 U.S.C. 633a(c). See Pet. App. A22-A23.

[5] Contrary to Judge Seymour's conclusion in dissent, consideration of petitioner's claim by the MSPB did not suffice to satisfy the requirement of administrative exhaustion. Section 1613.421 of 29 C.F.R., cited by Judge Seymour as authority for her conclusion that filing with the MSPB is sufficient, relates only to actions authorized to be filed in district court by 5 U.S.C. 7702 (1982)—that is, to "mixed" claims over which the MSPB has jurisdiction and to which the MSPB has given consideration on the merits. By definition, then, the regulation does not apply to this case if the MSPB was correct in its ruling.

2. However, petitioner still has ample opportunity to obtain consideration of the merits of his claim of discriminatory discharge.

a. Petitioner may elect to pursue his appeal of the MSPB decision to the Federal Circuit. Reversal by the Federal Circuit of the MSPB's ruling that petitioner's retirement was voluntary would result in a remand to the MSPB for consideration of petitioner's "mixed" discrimination claim on the merits. If the MSPB rejects the "mixed" claim, petitioner could then bring suit in district court under 5 U.S.C. 7703(b)(2) (1982). See 29 C.F.R. 1613.421.

b. If petitioner does not pursue his appeal to the Federal Circuit, or if the Federal Circuit upholds the MSPB's jurisdictional ruling, petitioner would then be able to fulfill the prerequisites to the filing of an independent district court action for discrimination. Under the relevant regulations, petitioner is entitled to an enlargement of time within which to file his complaint with the agency: 29 C.F.R. 1613.214(a)(4) states that "[t]he agency shall extend the time limits in this section when the complainant shows that * * * [he] was prevented by circumstances beyond [his] control from submitting the matter within the time limits." In this case, petitioner elected in good faith to proceed under 5 U.S.C. 7702(a)(1) by filing what he thought was a "mixed" adverse action-discrimination claim with the MSPB. Based on its own factual findings, rather than any misfeasance of petitioner, the MSPB determined that the claim was not "mixed" and that it therefore had no jurisdiction. (Assuming that the MSPB's decision is correct, petitioner's claim is an "unmixed" discrimination claim that should have been filed directly with the district court following agency consideration.) These circumstances warrant an enlargement of time under 29 C.F.R. 1613.214 once the MSPB proceedings and any judicial review of these proceedings have concluded. Petitioner may then file a complaint with the

agency and, if necessary, proceed to file a discrimination claim in district court within the applicable period. See 42 U.S.C. 2000e-16(c)(setting forth limitations period applicable to the filing of a district court action following complaint to the agency, incorporated by reference in Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. 794a. See also Section 15(c) of ADEA, 29 U.S.C. 633a(c)).

3. Nothing in the decisions below precludes de novo consideration of whether, notwithstanding his decision to retire, petitioner was the victim of unlawful discrimination under ADEA or the Rehabilitation Act of 1973. The court of appeals held only that there was no jurisdiction to bring an action under Section 7703(b)(2), not that there was no jurisdiction under the relevant Sections of ADEA or the Rehabilitation Act of 1973—the provisions under which any second action would be brought. Also, if petitioner has properly exhausted his administrative remedies by the time he files again, the obstacles to the present action will not exist. Thus, an affirmative defense of res judicata would be unwarranted, and would not foreclose petitioner's later action challenging the agency's conduct.[6]

---

[6] Nor would the MSPB's determination (or the Federal Circuit's affirmance) that petitioner's retirement was "voluntary" necessarily preclude his litigation in district court of the issue whether his separation from the agency nevertheless qualified as a discriminatory "constructive discharge," or whether the agency otherwise discriminated against him in violation of ADEA or the Rehabilitation Act of 1973. Compare Pet. App. A6 (court of appeals majority, stating in dictum, that "[i]f Wall, in fact and in law, voluntarily retired, he cannot argue that his termination was the result of agency discrimination").

It is true that petitioner cannot collect back pay or win reinstatement unless the court finds that he has been constructively discharged, see, *e.g.*, *Muller* v. *United States Steel Corp.*, 509 F.2d 923 (10th Cir.), cert. denied, 423 U.S. 825 (1975), and that his decision to retire would be pertinent to the issue of whether a constructive discharge had taken place. Cf. *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986)

Since the dismissal below was correct, and petitioner may still receive all of the relief he ultimately seeks, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
ROBERT M. LOEB
Attorneys

DECEMBER 1989

("the question on which constructive discharge cases turn is simply whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign"). However, the legal standard governing the MSPB's determination whether a decision to retire is "voluntary" may differ from the legal standard for determining whether a discriminatory discharge has occurred. See Pet. App. A30-A31, and compare the cases there cited (decision to retire to avoid termination for cause is deemed voluntary unless the "appellant • • • show[s] that the agency knew or believed that the removal action could not be substantiated") with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting forth order and burden of proof for discrimination claims under Title VII). Thus, the MSPB's ruling on the former question, even if upheld by the Federal Circuit, may not be preclusive on the latter.

U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00630